Superior Court of California

County of Los Angeles

Department 31

CALIFORNIA PHYSICIANS SERVICE, Plaintiff, v. MICHAEL JOHNSON, et al., Defendant(s).	Case No.: BC600453 Hearing Date: October 21, 2016 **[TENTATIVE] ORDER RE:** DEFENDANT MICHAEL JOHNSON'S SPECIAL MOTION TO STRIKE

Defendant Michael Johnson's Special Motion to Strike is DENIED.

Judicial Notice

Plaintiff requests the court take judicial notice of the existence of online blog entries and online L.A. Times articles to establish publication. The request is granted. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 761.)

Rulings on Plaintiff's Evidentiary Objections

Declarations of Sheryl L. Katz

Objection Nos. 1-2 – SUSTAINED.

Declaration of Michael Johnson

Objection No. 3 – SUSTAINED

Reply Declaration of Michael Johnson

Objection Nos. 4-10, 13-24, 31-32 – OVERRULED

Objection Nos. 11-12, 25-30 – SUSTAINED

Rulings on Defendant's Evidentiary Objections

Epstein Declaration

Objection No. 1 – SUSTAINED

Objection Nos. 2-23 – OVERRULED

Jacobs Declaration

Objection Nos. 24-44 – OVERRULED

Egan Declaration

Objection Nos. 45- 51 – OVERRULED

Menz Declaration

Objection Nos. 52-54 – OVERRULED

Objection Nos. 55-56 – SUSTAINED

Gettings Declaration

Objection Nos. 57-66 – OVERRULED

Objection Nos. 67-68 – SUSTAINED

Objection Nos. 69-87 – OVERRULED

Morrison Declaration

Objection Nos. 88-91 – OVERRULED

Step One: Acts in furtherance of the constitutional right of petition or free speech.

The Complaint alleges that Defendant Johnson "has repeatedly publicly divulged confidential and attorney-client privileged information about Blue Shield's confidential

corporate strategy, tax status, and legal strategies, including Blue Shield's confidential, non-public communications with the Franchise Tax Board, and confidential executive compensation matters." (Compl. ¶ 12.) The Complaint is also premised upon allegations that Defendant improperly retained confidential and attorney-client privileged documents belonging to Blue Shield. (Compl. ¶¶ 20, 25, 30, 37, 44.) The Complaint seeks two forms of relief: (1) the return or destruction of all confidential or privileged Blue Shield documents; and (2) the prohibition of Johnson's future use and disclosure of Blue Shield's confidential or privileged information.

Retention

As argued by Plaintiff in Opposition, the alleged improper retention of confidential materials and Plaintiff's request for their return or destruction is not conduct in furtherance of Defendant's right to petition or free speech. While defendant argues that the entire Complaint is subject to CCP § 425.16 and asks the court to strike the entire complaint, defendant only focuses on the portions of the Complaint relating to disclosure. As a result, defendant has failed to establish the application of CCP § 425.16 to the alleged improper retention of confidential information. Because each cause of action is supported by unprotected conduct, namely the wrongful retention of confidential information, each cause of action shall survive in part. The motion is DENIED to the extent it seeks to strike the entirety of the Complaint or the entirety of each cause of action asserted therein.

Disclosure

Defendant clearly articulates the legal basis for finding the allegations in the Complaint relating to Defendant's alleged disclosure of confidential and attorney-client privileged information is protected activity under CCP § 425.16. (Mo. at 4-7.) However, in Opposition, Plaintiff merely focuses on the non-speech conduct at issue when addressing the first prong

inquiry. (Opp. at 7-8.) The only two disclosures specifically identified in the Complaint are the disclosure of "confidential, non-public communications with the Franchise Tax Board, and confidential executive compensation matters." (Compl. ¶ 12.) The Complaint alleges that Defendant's disclosures breached the alleged contract between the parties, (Compl. ¶ 20), breached the implied covenant of good faith and fair dealing, (Compl. ¶ 25), violated Labor Code § 2860, (Compl. ¶ 30), breached Defendant's fiduciary duty, (Compl. ¶ 37), breached the duty of loyalty, (Compl. ¶ 41), and violated unfair competition law, (Compl. ¶ 44). Therefore, each cause of action is at least partially supported by Defendant's alleged disclosure of information.

In Opposition, Plaintiff identifies six disclosures made by Defendant that it deems actionable:

(1) disclosure of confidential tax communications with the FTB and the FTB's findings in connection with the tax audit;
(2) disclosure of tax implications and strategy of how Plaintiff legally structured the Care1st acquisition, which Defendant learned from General Counsel;
(3) disclosure of an attorney-client privileged estimate of Plaintiff's value that Defendant learned from General Counsel;
(4) disclosure of the retirement compensation paid by Plaintiff to departing CEO Bruce Bodaken;
(5) disclosure that the FTB was examining Plaintiff's tax exemption and initially revoked the exemption; and
(6) disclosure of copies or summaries of Plaintiff's correspondence with the FTB regarding its tax exemption.

(Gettings Decl. ¶ 4.) Each of these disclosures were made to the public and journalists. (*Id.* ¶¶ 5-13.) The disclosures surrounded Plaintiff's acquisition of Care1st, which is governed by the Health & Safety Code and was the subject of news reports. (Rothner Decl. Ex. A; Johnson Decl. Ex. D-E.) The disclosures clearly fall within the definition of protected activity provided by CCP § 425.16(e). (*See generally Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 523 ("We have little trouble concluding Fitzgibbons's e-mail message concerned 'a public issue' and 'an issue of public interest' under section 425.16, subdivision

(e)(4). IHHI's acquisition and operation of four Orange County hospitals was the subject of public hearings held by both the California Senate and the Orange County Board of Supervisors, and discussed in numerous articles in newspapers and other periodicals.").) Defendant has met his initial burden to establish that a portion of each cause of action arises from Defendant's exercise of free speech rights.

Therefore, the burden shifts to plaintiff to provide evidence to establish its claims based upon the public disclosure of information have "minimal merit." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 ("The plaintiff need only establish that his or her claim has 'minimal merit...'"). When addressing the use of confidential information, "the proper inquiry in the context of an anti-SLAPP motion is whether the plaintiff proffers sufficient evidence for such an inference." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822.)

Step Two: Probability of Prevailing on the Merits

If moving parties successfully have shifted the burden, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. (*Equilon Ent., LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; CCP § 425.16(b)(1).) "[A]n action may not be dismissed under this statute if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 729.) "The plaintiff need only establish that his or her claim has 'minimal merit'...to avoid being stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) "The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

"The plaintiff cannot simply rely on the allegations in the complaint . . . , but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010.)

First, Plaintiff argues that it has stated a claim for declaratory relief. However, the Complaint does not contain a separate claim for declaratory relief. Plaintiff cites *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 807, which merely found that the Court of Appeal "acted properly in modifying the judgment to include a declaration that defendants' lien against plaintiff was invalid . . . In her complaint, plaintiff adequately pled a claim for declaratory relief under Code of Civil Procedure section 1060 even though she did not separately identify such a cause of action." Specifically, the Court found that the complaint "asked the court to adjudge the rights and duties of plaintiff and defendants with respect to defendants' lien and alleged facts establishing an actual controversy appropriate for declaratory relief." *Id.* The instant Complaint does not seek to adjudicate the rights and duties of both parties, but rather seeks to enjoin Defendant from further disclosure. While the Complaint's prayer for relief asserts a request for two "declaration[s]," the declarations requested are effectively and practically requests for injunctive relief prohibiting Defendant from retaining, using, or disclosing confidential and/or attorney-client privileged documents. (Compl. at 7.) Plaintiff's attempt to raise an unstated and unpled declaratory relief cause of action, which merely seeks the same relief as the underlying claims is improper. (*See e.g. California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623–24 ("The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a

second cause of action for the determination of identical issues.").) Moreover, "[a]s is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings." (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.) The Complaint does not state a claim for declaratory relief.

Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing (First and Second Causes of Action)

Plaintiff also argues that Defendant violated "written obligations to BSC in the Employee Handbook, Code of Conduct, Telecommuting Agreement, and Attestations." (Opp. at 11.) Johnson argues that the employee handbook expressly states that it is not a contract: "Nothing in this Handbook, or any Blue Shield of California policies, rules or guidelines, or the Code of Business Conduct, is intended to be and is not a contract (express or implied), nor does it otherwise create any legally enforceable contractual obligations on the part of the Company." (Johnson Decl. Ex. C.) However, this provision is contained solely in a section regarding at-will employment and makes no reference to the other sections of the handbook. Johnson expressly agreed "to abide by the policies, rules and regulations" contained in the handbook. (Johnson Decl. Ex. B.) The handbook contains confidentiality provisions which provide that any employee that "has access to confidential employee information must keep this information confidential." (Johnson Decl. Ex. C at 8.) The provision further provides:

> All records and files maintained by the Company are confidential and remain the property of the Company. Such information may not be used by any employee . . . for obtaining personal gain or profit. Records and files are not to be disclosed to any outside party . . . without the express permission of Corporate Legal. . . . all employees at Blue Shield of California are required to sign a Confidentiality Agreement. However, all employees are subject to these confidentiality covenants regardless of whether there is a separate confidentiality agreement or not.

(*Id.*) Moreover, Johnson attested that he certified that he would comply with the Code of Conduct and not disclose confidential information. (Gettings Decl. Ex. N-9.) The Code of Conduct specifically provides that employees agree to keep employee salary information confidential. (Eagan Decl. Ex. 7 at 25, 27.) Johnson expressly acknowledged his agreement to abide by the Handbook and the Code of Conduct. (Gettings Decl. Ex. N-9; Johnson Decl. Ex. B-C.) The evidence indicates that Johnson publicly disclosed Plaintiff's attorney-client information (Jacobs Decl. ¶¶ 6-22), publicly disclosed confidential communications between Plaintiff and the FTB (Gettings Decl. ¶ 5, Ex. A-2 – A-16), and publicly disclosed non-public executive compensation. (Gettings Decl. ¶ 9, Ex. D-1–D-7.) Taken as a whole, Plaintiff's evidence is sufficient to meet its burden of establishing that its breach of contract claim and breach of the implied covenant of good faith and fair dealing claims have minimal merit.

Violation of Labor Code § 2860 (Third Cause of Action)

Labor Code § 2860 provides "[e]verything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment." "The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a breach of trust, and it is well settled that a court of equity will restrain any threatened disclosure or use thereof to the detriment of the employer. The character of the secrets, if peculiar and important to the business is not material. They may be secrets of trade, secrets of title, secrets of process of manufacture, or any other secrets of the employer important to his business. This principle is carried into the State Labor Code, section 2860." (*Santa Monica Ice & Cold Storage Co. v. Rossier* (1941) 42 Cal.App.2d 467, 470; *Riess v. Sanford* (1941) 47 Cal.App.2d 244, 246 (same).) "The language

in the statute has been applied to protect employee misappropriation of trade secrets and confidential information gained during employment." (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 855.) As the above authorities make clear, all that is required for a violation of Labor Code § 2860 is a detriment to the employer. There is no requirement, as urged by defendant, that defendant attain a monetary benefit. As with the breach of contract cause of action, Plaintiff has satisfied the minimal merit standard for this claim relating to the disclosure of confidential information.

Breach of Fiduciary Duty (Fourth Cause of Action); Breach of Duty of Loyalty (Fifth Cause of Action)

"The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer." (*Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295.) "A fiduciary duty is undertaken by agreement when one person enters into a confidential relationship with another. As the court explained in *Barbara A. v. John G., supra,* 145 Cal.App.3d 369, 193 Cal.Rptr. 422, a confidential relationship arises "where a confidence is reposed by one person in the integrity of another, and ... the party in whom the confidence is reposed, ... voluntarily accepts or assumes to accept the confidence. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 417 disapproved of on other grounds by *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.) The breach of fiduciary duty cause of action is supported by the same facts as the other causes of action. Additionally, Plaintiff provides evidence that Johnson created a blog/website called "makeitrightblueshield" while employed with Plaintiff and met with numerous individuals regarding his plan to pressure Plaintiff "to live up to its nonprofit mission." (Gettings Decl. ¶ 14, Ex. I-3 – I-9.) Plaintiff's evidence establishes minimal merit to the breach of fiduciary duty and breach of loyalty claims.

Unfair Competition (Sixth Cause of Action)

The sixth cause of action asserts liability pursuant to Business & Professions Code § 17200. (Compl. ¶¶ 44-45.) Plaintiff cites *People v. Los Angeles Palm, Inc.* (1981) 121 Cal.App.3d 25, 33, which noted "[a]n unlawful business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law." (Opp. at 13.) In *Los Angeles Palm*, the unlawful business practice at issue was the improper crediting of tips against minimum wages, a clear business act or practice. Plaintiff also relies upon *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1342, which did not address the statutory unfair competition provisions: "California has a statute allowing a court to enjoin unfairly competitive acts. (See Bus. & Prof. Code, §§ 17200 & 17203.) . . . Plaintiffs have not argued here or below that they seek relief under this statute. Accordingly, it appears they have confined their claim to common law unfair competition." (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1342.) Defendant argues for the first time in Reply, that a statutory claim cannot be brought against a former employee unless that employee seeks a commercial advantage or personal gain from their conduct. However, *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1291, cited by defendant, does not stand for this proposition, but rather found that misappropriation of confidential information to unfairly compete and solicit the employer's customers was sufficient. Nothing in *Courtesy*, *supra* created a personal gain or commercial advantage requirement. Pursuant to Business & Professions Code § 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." However, the code is meant to be construed broadly to prohibit conduct that destroys or prevents fair and honest competition. (Bus. & Prof. Code §§ 17001-17002.) The

disclosure of a company's confidential information would prevent or destroy fair and honest competition by precluding a company from relying upon confidentiality in the same manner as its competitors. Defendant provides no authority compelling a determination that the disclosure of confidential information to the detriment of a corporation is not actionable under Business and Professions Code Section 17200. The court finds that Plaintiff has established the minimal merit necessary to pursue this claim.

Application of Labor Code § 1102.5

Johnson argues that Labor Code § 1102.5 precludes enforcing any confidentiality obligation against him. Labor Code Section 1102.5 provides:

> An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

Notably, nothing in Labor Code § 1102.5 applies to disclosures to the general public and the Complaint makes no reference to disclosures to "a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry." Additionally, none of the six disclosures identified by Plaintiff (Gettings Decl. ¶ 4) involve such disclosures. There is no basis for the application of Labor Code § 1102.5 to the instant matter.

Noerr-Pennington Doctrine

Johnson also argues that he is immune from liability under the *Noerr-Pennington* doctrine. "The *Noerr–Pennington* doctrine, which arose in the context of antitrust law, holds that those who petition government for redress are generally immune from antitrust liability. In *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 137, the Supreme Court concluded that the Sherman Antitrust Act does not punish political activity through which the people freely inform the government of their wishes. The *Noerr–Pennington* doctrine was extended by the Supreme Court in *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 to the approach of citizens to administrative agencies and to courts. It has been applied to commercial speech and competitive activity, as well as to anticompetitive activity. [Citation]. The immunity applies to virtually any tort, including unfair competition and interference with contract." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 478.) As noted above, the Complaint does not contain any allegations regarding Defendant's approach to administrative agencies or court.

Defendant argues that the *Noerr-Pennington* doctrine protects public relations campaigns. (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1067 ("In the context of the right to petition, collateral protection has been extended to a railroad's public relations campaign aimed at influencing passage of favorable legislation [*Noerr, supra,* 365 U.S. at pp. 140–143, 81 S.Ct. 523.]"); *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 935 ("the law of this circuit establishes that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr–Pennington* doctrine, so long as they are sufficiently related to petitioning activity.").) However, as noted in Opposition, the cases involving public relations campaigns involved collective lobbying activities, (*Noerr*, *supra* at 140-43 (involving 24 railroads' campaign toward obtaining governmental action), and Defendant's testimony

indicates that his public campaign was not aimed at petitioning the government, but rather to "pressure Blue Shield to take its nonprofit mission more seriously." (Gettings Decl. Ex. I-3; I-7.) Therefore, Defendant has failed to establish the applicability of the *Noerr-Pennington* doctrine.

Additional Arguments

Defendant also argues that the confidentiality agreement serves an unlawful purpose because a confidentiality provision "cannot serve to impede a state agency's investigatorial prerogatives." (Mo. at 10-11.) Defendant relies upon *Cariveau v. Halferty* (2000) 83 Cal.App.4th 126, which involved an employee's affirmative obligation under the rules of the NASD to report the conduct of his or her employer. No such affirmative obligation existed here. Defendant also cites *D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 806, which cited *Cariveau.* However, *D'Arrigo* involved a breach of contract cause of action asserting that an employee breached a contract by assisting the general counsel of the Agricultural Labor Relations Board. *D'Arrigo, supra* at 800 ("In its complaint D'Arrigo asserted that the breach occurred by pursuing, and assisting the ALRB general counsel in pursuing, allegations that D'Arrigo had unlawfully promised benefits to employees.").) The Complaint at issue here contains no such allegations. Defendant's argument fails.

Defendant further argues that the Complaint contains an unconstitutionally vague request for an injunction. However, Defendant cites no authority for the proposition that an overbroad injunction request in a complaint is sufficient to support a motion to strike under CCP § 425.16. Defendant cites *Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1169, which involved an overbroad trial court order, which prohibited a defendant from publishing "any false and defamatory statements on the Internet." Here, no court order has been issued. Defendant has cited no authority for the proposition that a Complaint's prayer for injunctive relief, rather than a

court order, must be narrowly tailored. The breadth of any injunction issued in this matter is to be determined after a trial on the merits, not at the pleading stage.

Finally, Defendant argues that the court may not enjoin a completed act. "Ordinarily, injunctive relief is available to prevent threatened injury and is not a remedy designed to right completed wrongs. [Citations.] 'It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future. Indeed, a change in circumstances at the time of the hearing, rendering injunctive relief moot or unnecessary, justifies denial of the request.' [Citation.] Unless there is a showing that the challenged action is being continued or repeated, an injunction should be denied." (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 464-65.) Defendant also cites *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 771-74 in support of this argument. In *Singletary,* the court found that there was no evidence that the defendant "has continued to attempt to profit from his bribery, such that an injunction should issue." (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772.) *Singletary* did not involve the disclosure of confidential information in the possession of a defendant, as is the issue here. Moreover, while Johnson attested that he did not have any "plans at this point to disclose any nonpublic information," he affirmatively stated that there was other non-public information that he considered disclosing in connection with his campaign. (Gettings Decl. Ex. N-6.) Additionally, Johnson has affirmatively testified that he would ignore confidentiality and attorney-client privilege designations. (Gettings Decl. Ex. H-17.) The evidence is sufficient for purposes of an anti-slapp motion, to establish a threat of future disclosure of confidential information.

The court finds that Plaintiff has established a probability of prevailing on the merits sufficient to defeat Defendant's motion. As a result, defendant's motion is DENIED.

Plaintiff is ordered to give notice.

DATED: October 21, 2016

Hon. Samantha P. Jessner
Los Angeles Superior Court